

APPEAL NO. 170159

FILED MARCH 10, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 15, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the (date of injury), compensable injury extends to a cervical sprain/strain; (2) the respondent (claimant) reached maximum medical improvement (MMI) on December 24, 2015; and (3) the claimant's impairment rating (IR) is 28%.

The appellant (carrier) appealed, contending that the hearing officer's determinations are against the great weight and preponderance of the evidence. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated in part to the following: the claimant sustained a compensable injury on (date of injury), at least in the form of a right knee ACL sprain, ACL tear and lateral meniscus tear of the right knee, right shoulder rotator cuff sprain and rotator cuff tear, right elbow lateral epicondylitis, right foot/ankle sprain, and a lumbar and thoracic sprain/strain. The claimant testified that a Ford 150 pickup that was in neutral rolled onto the right side of his body from his ankle to his neck, and rolled back down his body when a coworker put the truck in reverse to free the claimant.

EXTENT OF INJURY

The hearing officer's determination that the (date of injury), compensable injury extends to a cervical sprain/strain is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor

unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The hearing officer determined that the claimant reached MMI on December 24, 2015, with a 28% IR as certified by (Dr. MG), the designated doctor.

Dr. MG examined the claimant on February 17, 2016, and certified that the claimant reached MMI on December 22, 2015, with a 28% IR. A letter of clarification was sent to Dr. MG notifying her that the date of statutory MMI was December 24, 2015, and requested Dr. MG to provide an amended Report of Medical Evaluation (DWC-69) reflecting the correct statutory MMI date. Dr. MG responded with an amended DWC-69 certifying the claimant reached MMI statutorily on December 24, 2015, with a 28% IR. We note that the parties did not stipulate to the date of statutory MMI, nor did the hearing officer make any findings of fact regarding that date.

Dr. MG noted in her narrative report dated February 17, 2016, diagnoses of a cervical strain/sprain, lumbar strain/sprain, thoracic strain/sprain, right foot strain/sprain, right ankle strain/sprain, right elbow lateral epicondylitis, right shoulder rotator cuff tear, anterior cruciate ligament, medial collateral ligament, and medial and lateral meniscus tears of the right knee. We note the parties did not stipulate that the compensable injury extended to a medial meniscus tear, nor was that condition actually litigated at the CCH.

Using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), Dr. MG placed the claimant in Diagnosis-Related Estimate (DRE) Cervicothoracic Category II: Minor Impairment for 5% impairment for the cervical spine, DRE Category I: Complaints or Symptoms for 0% impairment for the thoracic spine (we note that Dr. MG did not specify whether she placed the claimant in DRE Thoracolumbar or DRE Cervicothoracic for the claimant's thoracic spine), and DRE Lumbosacral Category II: Minor Impairment for 5% impairment for the lumbar spine. Dr. MG also assessed 11% whole person impairment (WPI) for the claimant's right shoulder based on range of motion (ROM) measurements, 0% WPI for the claimant's right elbow due to invalidated ROM, and 3% WPI for the

claimant's right ankle based on ROM measurements. Using Table 64 on page 3/85 of the AMA Guides, Dr. MG assessed 4% WPI for partial medial and lateral meniscectomies. Using these figures, Dr. MG assessed a 28% IR. We note that when using the Combined Values Chart (CVC), Dr. MG's figures yield a 24% IR, not a 28% IR as assessed by Dr. MG. It appears from Dr. MG's report that she added her figures rather than combining each organ system using the CVC as instructed by page 2/8 of the AMA Guides.

As noted above, the parties have stipulated that the compensable injury is at least in the form of a right knee ACL sprain, ACL tear and lateral meniscus tear of the right knee, right shoulder rotator cuff sprain and rotator cuff tear, right elbow lateral epicondylitis, right foot/ankle sprain, and a lumbar and thoracic sprain/strain. The parties did not stipulate that the injury extended to a medial meniscus tear, nor was that condition actually litigated at the CCH. Dr. MG considered and rated a condition that has not been determined to be part of the compensable injury, and her MMI/IR determination cannot be adopted. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on December 24, 2015, with a 28% IR.

There are other MMI/IR certifications in evidence. The first is Dr. MG's original DWC-69 certifying that the claimant reached MMI on December 22, 2015, with a 28% IR. As explained above, Dr. MG considered and rated a condition that has not been determined to be part of the compensable injury. Accordingly, her original DWC-69 cannot be adopted.

The next MMI/IR certification is from (Dr. R), a referral doctor. Dr. R examined the claimant on January 5, 2016, and certified that the claimant reached MMI on December 17, 2015, with a 13% IR. However, Dr. R did not consider the compensable conditions of a cervical sprain/strain or a thoracic sprain/strain. Accordingly, his MMI/IR certification cannot be adopted.

The final MMI/IR certification is from (Dr. C), the post-designated doctor required medical examination doctor. Dr. C examined the claimant on May 11, 2016, and certified that the claimant reached MMI on October 13, 2015, with a 14% IR. Dr. C stated in his narrative report that he had not received any Request for Designated Doctor (DWC-32), and did not receive an analysis letter or anything with a list of accepted and not accepted body part injuries, and therefore relied upon the body parts considered by Dr. MG. We note that Dr. C's IR included a 4% impairment under Table 64 of the AMA Guides for "bilateral partial lateral meniscectomy and medial meniscectomy." Dr. C's MMI/IR cannot be adopted for the same reason that Dr. MG's MMI/IR certifications cannot be adopted: Dr. C considered and rated a medial meniscus tear. Additionally, we note that Dr. C placed the claimant in DRE

Cervicothoracic Category I: Complaints or Symptoms for 0% of the claimant's thoracic spine. Page 3/95 of the AMA Guides states that for purposes of the AMA Guides, the cervical region may be considered to represent the Cervicothoracic region, the thoracic region to represent the Thoracolumbar region, and the lumbar region to represent the Lumbosacral region. See Appeals Panel Decision (APD) 051306-s, decided August 3, 2005; APD 150558, decided May 8, 2015.

Because there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the (date of injury), compensable injury extends to a cervical sprain/strain.

We reverse the hearing officer's determination that the claimant reached MMI on December 24, 2015, and we remand the issue of MMI to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is 28%, and we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. MG is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. MG is still qualified and available to be the designated doctor. If Dr. MG is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

On remand the hearing officer to request the parties to stipulate to the date of statutory MMI. If the parties are unable to stipulate, the hearing officer is to make a finding of fact of that date. The hearing officer is to notify the designated doctor that the compensable injury extends to a right knee ACL sprain, ACL tear and lateral meniscus tear of the right knee, right shoulder rotator cuff sprain and rotator cuff tear, right elbow lateral epicondylitis, right foot/ankle sprain, a lumbar and thoracic sprain/strain, and a cervical sprain/strain, and request the designated doctor determine the claimant's MMI, which cannot be after the date of statutory MMI, and rate the claimant's compensable injury in accordance with the AMA Guides.

If Dr. MG is still qualified and available to serve as the designated doctor, the hearing officer is to notify Dr. MG that page 2/8 of the AMA Guides provide that each organ system impairment should be expressed as a WPI, then the WPIs should be combined by means of the CVC chart on page 322. The hearing officer is to request Dr. MG to consider and rate the entire compensable injury in accordance with the AMA Guides considering the medical record and the certifying examination, and that the date of MMI cannot be later than the statutory date of MMI.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The hearing officer is then to make a determination on MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge